

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Kathleen Jansen, Presiding Judge

MICHIGAN ASSOCIATION OF HOME
BUILDERS; ASSOCIATED BUILDERS AND
CONTRACTORS OF MICHIGAN;
and MICHIGAN PLUMBING AND
MECHANICAL CONTRACTORS
ASSOCIATION, Michigan nonprofit
corporations,

Supreme Court No. 149150

Court of Appeals No. 313688

Lower Court No. 10-115620-CZ

Plaintiffs/Appellants,

v

CITY OF TROY,
a Michigan Home Rule City,

Defendant/Appellee.

149150
reply

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**REPLY BRIEF ON BEHALF OF APPELLANTS MICHIGAN ASSOCIATION OF HOME
BUILDERS; ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN; and
MICHIGAN PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION**

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I. INTRODUCTION

On May 19, 2014, Defendant/Appellee, City of Troy (the "City") filed its Brief in Response ("Response Brief") to the Application for Leave to Appeal filed by Plaintiffs/Appellants, Michigan Association of Home Builders, Associated Builders and Contractors of Michigan, and Michigan Plumbing and Mechanical Contractors Association (collectively, the "Builders"). The Builders now file this Reply Brief.

II. CORRECTION OF FACTS

The City commits several pages of its Response Brief (pp 2-7) to attempting to convince this Court of the efficiency and cost savings derived from its privatization of its Building Department through its contract with Safe Built of Michigan, Inc. The issue before this Court, however, is neither the alleged efficiency nor the alleged cost savings garnered from privatization. The issue before this Court is whether the State Construction Code Act ("CCA") requires the exhaustion of administrative remedies. Therefore, the City's Counter Statement of Facts is largely irrelevant to the proceedings before this Court. Rather, the place for the City's unsubstantiated "facts" is on remand by this Court to the circuit court for a trial on the merits of the Builders' claims.

III. ARGUMENT

A. This Case Involves Issues Significant To This State's Jurisprudence And The Decision Of The Court Of Appeals Is Contrary To Existing Precedent

At pages 9-10 of its Response Brief, the City claims that this Court need not grant leave to appeal because the law is settled with respect to the exhaustion of administrative remedies. While that may be true with respect to the law on exhaustion generally, it is not with respect

to the law on exhaustion specifically – that is, as applied to the CCA. To date, only one published decision exists on this issue – a decision which the Court of Appeals did not follow and a decision which the City now challenges as not applicable to this case. In *Winter Bldg Corp v City of Novi*, 119 Mich App 155; 326 NW2d 409 (1982), the Court of Appeals held that the CCA did not require plaintiff builders to exhaust their administrative remedies, stating:

Defendants first contend that plaintiffs should have been barred from obtaining relief in circuit court by their failure to exhaust available administrative remedies. In the lower court, defendants claimed that plaintiffs should have sought review of their claim by the State Construction Commission pursuant to MCL §125.1509a; MSA §5.2949(9a). **We agree with plaintiffs that this statutory provision applies only to evaluation of an agency's performance in enforcing building codes, not to review of a city's substantive enactments.**

Winter Bldg, 119 Mich App at 156-157 (emphasis supplied).

The City claims at pp 13-14 of its Response Brief that the *Winter* decision does not apply because the CCA was revised after the *Winter* decision in 1982. As discussed by the Builders at page 18 of their Application, the revisions to the relevant provision of the CCA, post-*Winter* decision, were non-substantive. The Builders attached the following redline of the statutory text showing the revisions from pre-*Winter* CCA §9a to post-*Winter* CCA §9b:

125. ~~1509a~~1509b. Performance evaluations, notice of intent to withdraw responsibility enforcing agencies

Sec. 9a**9b**. (1) The ~~executive~~ director, as prescribed in this section, may conduct a performance evaluation of an enforcing agency to assure that the administration and enforcement of either a nationally recognized model code or this act and the code is being done pursuant to either section ~~88a~~ or section **98b**. [FN1] A performance evaluation may only be conducted either at the request of the local enforcing agency or upon the receipt of a written complaint. If a performance evaluation is to be conducted upon the receipt of a written complaint, the ~~executive~~ director shall first refer the written complaint to the affected enforcing agency requesting a written response within 10 days. If the

local enforcing agency fails to provide a written response, or if the response is considered inadequate, the ~~executive~~ director shall consult with the commission and request approval to conduct the performance evaluation. The ~~executive~~ director shall submit a written recommendation to the commission and shall send a copy to the affected enforcing agency, along with a reasonable notice of the commission meeting at which the recommendation will be presented. The decision of the commission to proceed with a performance evaluation shall be made at a public meeting. This decision shall be mailed to the enforcing agency 10 days in advance of conducting the performance evaluation.

(2) When conducting a performance evaluation of an enforcing agency, the ~~executive~~ director may request that the local enforcing agency accompany the ~~executive~~ director or other state inspectors on inspections. The inspections shall be for the enforcement of this act and the code or ~~another nationally recognized model code~~. The enforcing agency shall maintain all official records and documents relating to applications for permits, inspection records including correction notices, orders to stop construction, and certificates of use and occupancy. The enforcing agency shall make available for review all official records between 8 a.m. and 5 p.m. on business days.

(3) Upon completion of a performance evaluation, the ~~executive~~ director shall report the findings and any recommendations to the commission and the local enforcing agency. The commission may issue a notice of intent to withdraw the responsibility for the administration and enforcement of this act and the code, ~~or a nationally recognized model building code, or other nationally recognized model codes~~ from a governmental subdivision after receiving the results of a performance evaluation. The notice shall include the right to appeal within 30 business days after receipt of the notice of intent to withdraw the responsibility. The notice shall also include the findings of the ~~executive~~ director, after completion of a performance evaluation, that the enforcing agency of that governmental subdivision has failed to follow the duties recognized under this act, the code, or its ordinance, ~~or that the enforcing agency has failed in the administration and enforcement of other nationally recognized model codes adopted by that governmental subdivision~~. Failure by the enforcing agency, or the chief elected official of that governmental subdivision to request a hearing within 30 business days after receipt of the notice of intent to withdraw the responsibility shall be considered to exhaust the enforcing agency's administrative remedies and the notice shall be considered a final order of the commission under ~~Act No. 306 of the Public Acts~~ **administrative procedures act** of 1969, ~~as amended 1969 PA 306, MCL 24.201 to 24.328~~. The ~~executive~~ director shall assume responsibility for the administration and enforcement of this act and the code, unless the county within which that governmental subdivision is located has submitted a notice of intent to continue to administer and enforce this act

and the code, when the notice is considered a final order of the commission. A structure commenced under an effective code shall be completed under that code.

(4) If an enforcing agency or the chief elected official of the governmental subdivision transmits an appeal of the notice of intent to withdraw the responsibility issued under subsection (3), the commission chairperson shall request the office appointment of ~~hearings to appoint~~ a hearings officer. The hearings officer shall conduct a hearing of the appeal pursuant to ~~Act No. 306 of the Public Acts administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328 as amended,~~ and issue a proposed decision which shall be sent to the affected parties. The proposed decision shall become the final order issued by the commission, unless exceptions are filed by a party within 30 days after receipt of the proposed decision. The commission shall review the proposed decision when exceptions are filed.

(5) The commission in reviewing a proposed decision may affirm, modify, reverse, or remand the proposed decision. When the commission affirms, modifies, reverses, or remands a proposed decision, the decision of the commission shall be in writing and contain the findings of fact and conclusions of law upon which its decision is based. Other than in a case of remand, the period for seeking judicial review of the commission's decision under section 104 of ~~Act No. 306 of the Public Acts administrative procedures act of 1969, as amended, being~~ 1969 PA 306, MCL 24.304, shall begin to run upon receipt by the parties of the commission's written decision.

See, MCL 125.1509a and MCL 125.1509b. The City's claim that *Winter* does not apply here because the statute changed is without merit.¹

B. The Decision Of The Court Of Appeals Is Erroneous And Will Cause Material Injustice

At pages 10-12 of its Response Brief, the City discusses the "many" powers of the Director under the CCA. To be sure, the CCA grants certain powers to the Director – but only

¹Similarly, the City's claim that *Winter* does not apply because it involved a question of preemption is without merit. Simply put, whether the underlying substantive claim is preemption or illegal appropriation of user fees makes no difference with regard to the issue of whether exhaustion of administrative remedies is required under the CCA.

in his discretion and only in conjunction with the enforcing agency – the City (not private entities like the Builders). Section 9b of the CCA provides in relevant part:

- The director, as prescribed in this section, **may** conduct a performance evaluation of an enforcing agency to assure that the administration and enforcement of this act and the code is being done pursuant to either section 8a or 8b.
- A performance evaluation **may** only be conducted either at the request of the local enforcing agency or upon the receipt of a written complaint.
- **If** a performance evaluation is to be conducted upon the receipt of a written complaint, the director shall first refer the written complaint to the affected enforcing agency requesting a written response within 10 days.
- If the local enforcing agency fails to provide a written response, or if the response is considered inadequate, the director shall consult with the commission and request approval to conduct the performance evaluation.²
- This decision [to conduct a performance evaluation] shall be mailed to **the enforcing agency**³ 10 days in advance of conducting the performance evaluation.
- When conducting a performance evaluation of an enforcing agency, the director may request **that the local enforcing agency**⁴ accompany the director or other state inspectors on inspections.
- Upon completion of a performance evaluation, the director shall report the findings and any recommendations **to the commission and the local enforcing agency**.⁵
- The commission may issue a **notice of intent to withdraw the responsibility for the administration and enforcement of this act and**

²Query – what happens if the enforcing agency provides an adequate response? There is no opportunity for any other party to respond?

³No mailing or other form of notice is required to be made to any other party.

⁴No participation in the investigation by any other party is permitted.

⁵Only the Commission and the enforcing agency are required to receive the Director's findings or recommendations – no one else.

the code from a governmental subdivision⁶ after receiving the results of a performance evaluation.

- The notice shall include the **right to appeal** within 30 business days **after receipt of the notice of intent to withdraw the responsibility.**⁷
- Failure **by the enforcing agency or the chief elected official of that governmental subdivision** to request a hearing within 30 business days after receipt of the notice of intent to withdraw the responsibility **shall be considered to exhaust the enforcing agency's administrative remedies** and the notice shall be considered a final order of the commission under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.⁸
- **If an enforcing agency or the chief elected official of the governmental subdivision transmits an appeal** of the notice of intent to withdraw the responsibility issued under subsection (3), the commission chairperson shall request appointment of a **hearings officer.**⁹
- The hearings officer shall conduct a hearing of the appeal pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, and issue a proposed decision which shall be sent to the affected parties. The proposed decision shall become the final order issued by the commission, unless exceptions are filed by a party within 30 days after receipt of the proposed decision.

MCL 125.1509b.

⁶Withdrawal is the only possible remedy provided. None of the remedies requested here by the Builders are even possible under Section 9b's administrative remedy provisions.

⁷ The only right of appeal is from a decision to withdraw responsibility to administer and enforce the CCA from the governmental subdivision. There is no right of appeal from any decision to NOT withdraw responsibility. Therefore, there is no right of appeal for any party except the enforcing agency/governmental subdivision. There is no right of appeal for the Builders.

⁸Only the enforcing agency can achieve exhaustion of its administrative remedies. There is no means by which any other party can achieve exhaustion of its administrative remedies.

⁹The opportunity for a hearing is afforded only to the enforcing agency/governmental subdivision. Parties such as the Builders have no opportunity for a hearing.

Absent from these statutory provisions is any express intent by the Legislature to make the jurisdiction of the Director exclusive. Further, these purported rights and remedies are wholly inadequate. The only available remedy under the CCA is the removal of the City's authority to prospectively enforce the CCA.¹⁰ There are no provisions for injunctive or declaratory relief, an accounting, sanctions, monetary fines and penalties or the disgorgement of unlawfully obtained revenues. In short, the persons/entities paying the fees are without any means of redress. As a result, exhaustion of administrative remedies is not required as a matter of law. *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000) (Before exhaustion is required, there must be an adequate remedy and an express Legislative intent to make an administrative tribunal's jurisdiction exclusive.).¹¹

At pages 16-17 of its Brief, the City claims that §9b of the CCA comports with procedural due process because notice of a commission meeting is required and the decision on whether to proceed with a performance evaluation must be made at a public meeting. Under the City's own case law, this is untrue. Procedural due process requires, at a minimum, adequate notice,

¹⁰This is unlike the provisions of the Liquor Control Act, cited as persuasive authority by the City, wherein penalties, fines, imprisonment, license suspension and revocation are provided for "upon due notice and proper hearing." Further, the group of people potentially harmed by violations of the Liquor Control Act are not numerous tax/user fee paying individuals such as members of the Builders. MCL 436.1903 and MCL 436.1909.

¹¹For similar reasons, the City's claim that the Builders had to exhaust their administrative remedies because the CCA does not authorize a private cause of action is misplaced. First, even where a statute does not expressly authorize a private cause of action, one can be inferred where, as here, the statutory remedy is inadequate or a contrary intent is not clearly apparent. *Lash v City of Traverse City*, 479 Mich 180, 192; 735 NW2d 628 (2007). Second, even the lack of a private cause of action for monetary damages will not bar declaratory and injunctive relief. *Lash*, 479 Mich at 196.

opportunity to be heard and a fair and impartial tribunal. *Hughes v Almena Twp*, 284 Mich App 50, 69; 771 NW2d 453 (2009). Section 9b of the CCA requires that notice of a commission meeting be given ONLY to the enforcing agency. Thus, only the enforcing agency has advance notice of the public meeting at which the Director will make his/her decision on whether to proceed with a performance evaluation. Thereafter, only the enforcing agency is given notice of the Director's decision. MCL 125.1509b. This procedure does not allow private parties such as the Builders adequate notice or opportunity to be heard. In other words, there is no *constitutional* administrative procedure in the CCA for the Builders to exhaust.

C. Public Policy Considerations Support Reversal Of The Court Of Appeals

The City fails to substantively address that portion of the Builders' Application (pp 24-25) demonstrating that the four policy considerations regarding the exhaustion doctrine weigh in favor of reversing the decision of the Court of Appeals in this case. Instead, the City merely rehashes its prior argument pertaining to only one of the four considerations that "judicial review is best made after a full factual record is made by the agency with the technical knowledge to adequately determine if there is a violation." Response Brief, p 17. The City's argument places "the cart before the horse." Before judicial review can be undertaken, litigants must have the opportunity to make a full factual record. Under the CCA, for any party other than the enforcing agency, this is a factual impossibility. Moreover, there is simply no evidence that either the Director or the Commission have any particular special expertise in municipal accounting. Therefore, to the extent the Builders could make a factual record, there is no particular benefit to that record having been made before the Director or Commission as

opposed to a court where expert witnesses could testify. In sum, the policies underlying the exhaustion of administrative remedies doctrine weigh against requiring exhaustion on the facts of this case.

D. There Is No Administrative Remedy For Headlee Amendment Violations

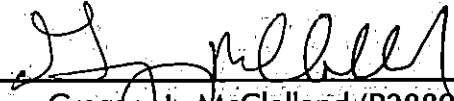
The City raises no new arguments in response to the Builders' position that the circuit court has original jurisdiction over their Headlee Amendment claims but, instead, continues to rely upon *Womack-Scott v Dep't of Corrections*, 246 Mich App 70; 630 NW2d 650 (2001) for the proposition that exhaustion still applies "when there are allegations of constitutional violations." This principle, however, does not apply here because the issues (fee reasonableness, Section 22 of the CCA and Headlee Amendment) are not "properly before an administrative agency" in the manner that the employment grievances of state employees were in *Womack-Scott*. Further, the City fails to address the fact that there is no Michigan case that has required a Headlee Amendment claimant to exhaust administrative remedies. To the contrary, in the one Court of Appeals opinion that affirmed dismissal of a Headlee Amendment claim for failure to exhaust an express administrative remedy, this Court reversed, even though the remedy was specifically applicable to the plaintiff (and not some other party). *Durant v State*, 413 Mich 862; 317 NW2d 854 (1982).

IV. CONCLUSION AND RELIEF REQUESTED

The lower courts were wrong in their application of the exhaustion of administrative remedies doctrine. Accordingly, this Court should peremptorily reverse the March 13, 2014 Opinion of the Court of Appeals and remand this case to the Oakland County Circuit Court for

a decision on the merits of the Builders' Motion for Summary Disposition or, alternatively, grant the Builders' Application for Leave to Appeal.

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